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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Time Corporation ("General Time"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in Docket No. 32792 on November 19, 1968.

Opinions Below

The opinion of the Court of Appeals is not as yet officially reported, but is printed as Appendix A hereto.

The final judgment of the United States District Court for the Southern District of New York, entered November 4, 1968, is printed as Appendix B hereto.*

Jurisdiction

The Judgment of the Court of Appeals affirming the final judgment of the District Court was entered on November 19, 1968 and is printed as Appendix C hereto. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

Questions Presented

By enacting §17(d) of the Investment Company Act of 1940 (the "Act"), Congress expressly proscribed joint transactions involving mutual funds and their affiliates "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."

In this case, the Securities and Exchange Commission (the "Commission") held, after a full evidentiary hear-

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* The first decision of the District Court in this case is reported in 286 F. Supp. 50 (S. D. N. Y. 1968). On July 31, 1968 that decision was reversed by the Second Circuit, 399 F. 2d 396 (2d Cir. 1968), but that Court refused to direct the entry of the relief sought by the Securities and Exchange Commission and General Time, and General Time immediately petitioned this Court for a writ of certiorari (pending in Docket No. 512) to review that decision which raised questions "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945). Any doubts as to the finality of the questions presented by that Petition were resolved when the Court of Appeals handed down its second decision in this case, final for all purposes, on November 19, 1968 (Appendix A hereto), which affirmed the final judgment of the District Court entered following the remand of the case to it by the July 31, 1968 decision of the Court of Appeals.

ing, that a mutual fund (respondent American Investors Fund, Inc.) and its affiliate (respondent Talley Industries, Inc.) had violated the Act by engaging in a joint transaction to acquire the stock of a portfolio company of the fund (General Time) for the ultimate purpose of enabling the affiliate to take control of that portfolio company, in contravention of the Commission's Rule 17d-1.

Notwithstanding the Commission's holding, the mutual fund and its affiliate continued their unlawful joint transaction by voting their unlawfully acquired General Time stock to consummate the takeover. The Commission thereupon brought suit in the District Court to protect its primary jurisdiction under the Act, and sought, *inter alia*, to prevent certification of those votes unless and until the Commission first passed upon and approved that aspect of the continuing joint transaction as required by its Rule 17d-1. On July 31, 1968, the Court of Appeals upheld the Commission's previous formal determination that the Act had been violated. The Court below, however, effectively nullified the Commission's determination and usurped its exclusive jurisdiction under the Act, by judicially sanctioning the consummation of the joint transaction, and by directing the District Court not to grant the relief sought by the Commission. Upon appeal from the remanded proceedings of the District Court, the Court of Appeals on November 19, 1968 confirmed its earlier decision, and also held that General Time (an affiliate and portfolio company of a mutual fund) did not have standing to challenge violations of the Act.

The following questions are presented:

1. Whether the Court of Appeals (a) improperly refused to defer to the exclusive and primary jurisdiction of the Commission to review and approve or disap-

prove joint transactions under the Act, and (b) exceeded its authority by itself sanctioning and approving such joint transactions in derogation of the Congressionally delegated regulatory functions of the Commission.

2. Whether the Court of Appeals, by denying General Time standing to sue, standing to appeal from an adverse lower court judgment, and standing to elicit proof, has established an overly-restrictive, novel and improper standard which is in conflict with principles enunciated by this Court and which will deprive aggrieved parties, having a substantial personal stake in the outcome, of their fundamental right to be heard.

Statute Involved

The relevant portions of the Investment Company Act of 1940, §§1, 2(a)(3), 17(d), 38(a), 42(e), 43(a); 15 U.S.C. §§80a-1, 80a-2 (a) (3), 80a-17(d), 80a-37(a), 80a-41(e), 80a-42(a); and Rule 17d-1, 17 C.F.R. 270.17d-1, are set forth in Appendix D hereto.

Statement of the Case

1. Summary of Proceedings Leading to Petition in Docket No. 512

General Time's Petition in Docket No. 512 discusses in detail the developments in this case through the Court of Appeals' first opinion of July 31, 1968. For the Court's convenience, those developments are summarized here.

On April 19, 1968, the Commission held that Talley Industries, Inc. ("Industries") and American Investors Fund, Inc. ("Fund") had acquired substantial blocs of General Time stock (22% of the total then outstanding) in a secret, coordinated and joint scheme to effectuate a

takeover of General Time in violation of §17(d) of the Act and the Commission's Rule 17d-1 (Appendix D to Petition in Docket No. 512).* The Commission's holding was disregarded by Industries and Fund when they proceeded to vote their unlawfully acquired General Time stock to elect a slate of directors selected, sponsored and financed by Industries. The Commission thereupon brought suit in the District Court for injunctive relief to protect its jurisdiction and review powers under the Act, and to enforce compliance with its decision. The District Court dismissed the action on the ground that the Act had not been violated (Appendix B to Petition in Docket No. 512).

Upon appeal, the Court of Appeals, in an opinion issued on July 31, 1968 (sometimes hereinafter referred to as the "July opinion"), upheld the Commission's determination of a violation, reversed the dismissal and remanded the case to the District Court to formulate an injunction consistent with that opinion (Appendix A to Petition in Docket No. 512). However, the July opinion also determined that the relief sought by the Commission—either to compel respondents to seek Commission approval, as required under §17(d) and Rule 17d-1, of their further joint transaction to vote their unlawfully acquired stock and complete their takeover, or to enjoin that joint transaction as the fruit of their unlawful ac-

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* The Commission's formal determination of April 19, 1968 resulted from a belated application filed by Industries and Fund with the Commission on March 26, 1968, seeking *nunc pro tunc* Commission approval of their joint transaction to acquire General Time stock. That determination was preceded by a full evidentiary hearing before the Commission on April 16, 17 and 18, 1968, in which General Time, Industries and Fund participated.

quisition of stock—was inappropriate.* At that point, General Time filed its Petition in Docket No. 512.

2. District Court Proceedings Upon Remand

Upon remand from the Court's July decision, the Commission submitted to the District Court a proposed final judgment, with which General Time concurred, in support of the Commission's delegated jurisdiction under the Act. That proposed judgment provided in part for the withdrawal of the votes cast by Industries and Fund at the General Time Annual Meeting, unless and until they applied to the Commission and received its approval to vote as required by §17(d) and Rule 17d-1. The Commission stated to the District Court that:

> "A decree such as we propose, which prohibits Talley [Industries] and the Fund from 'taking over' General Time without approval by the Commission, is necessary to stop a continuing violation of Section 17(d)." (Memorandum of the Securities and Exchange Commission in Support of Its Proposed Final Judgment of Permanent Injunction, p. 3)
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> ". . . it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved. Conse-

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* The Commission's complaint of May 1, 1968 set forth the Commission's determination that Industries and Fund had violated the Act by reason of their joint acquisition program, and alleged that Industries and Fund were continuing "to engage in unlawful" transactions by voting at General Time's annual meeting, notwithstanding Commission disapproval of that program. The Commission requested, *inter alia*, relief which would have enjoined Industries and Fund from participating in such transactions "without first having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having first been granted by order of said Commission." (Complaint, p. 4 ¶ (1)).

> quently, for this Court to determine whether or not Talley [Industries] and the Fund should be permitted to take over General Time without the approval of the Commission would be, in the words of the Supreme Court, 'an unwarranted incursion into the administrative domain.' *Securities and Exchange Commission* v. *New England Electric System,* 390 U.S. 207, 211 (1968)." (*Id.* at 5)

The District Court not only rejected the Commission's proposed judgment, but also refused to hold an evidentiary hearing as requested by General Time, with the support of the Commission, to ascertain the facts necessary to determine appropriate relief.*

The District Court's final judgment ordered General Time to reconvene its annual meeting and to count the votes cast by Industries and Fund in favor of Industries' slate of directors, although these votes represented unlawfully acquired stock, and were the principal means for consummating the unlawful joint transaction. That final judgment by-passed the Commission's procedures and powers under the Act by giving judicial sanction to a continuing joint transaction which, as the Commission properly argued, could only be initially reviewed and approved or disapproved under the Act upon application to the Commission.

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* Although stating in advance that it would be summarily rejected, the District Court gave General Time one day to prepare and present an offer of proof. The Court of Appeals stated in respect thereof merely that the District Court ". . . allowed [General Time's] counsel to make an extensive offer of proof." (Appendix A, p. 5a) The Court of Appeals' opinion did not consider the summary rejection of such offer, its contents, or the Commission's support in respect thereof. See also footnote at page 11, *infra*.

3. Proceedings on Appeal from the District Court's Final Judgment and the Court of Appeal's Opinion of November 19, 1968

On October 8, 1968, General Time appealed from the final judgment of the District Court. General Time argued to the Court of Appeals, and its position was supported by the Commission, that the District Court was required to defer to the Commission's exclusive primary jurisdiction (a) to protect the integrity of the Congressionally delegated regulatory functions of the Commission to pass upon joint transactions, and (b) to utilize the Commission's expertise in overseeing joint activities of mutual funds and their statutory affiliates.

By opinion of November 19, 1968 (sometimes hereinafter referred to as the "November opinion"), the District Court's final judgment was affirmed by the Court of Appeals.

In that decision, the Court below recognized that the question "of the proper relation of court and agency in the enforcement of the Investment Company Act" was "by no means an unimportant one." (Appendix A, p. 10a)

By resolving this question in favor of the judiciary, the Court usurped and negated the Commission's exclusive jurisdiction to review and approve under §17(d) and Rule 17d-1 the continuation and consummation (by voting) of the unlawful joint transaction. Without addressing itself to the paramount point that Congress had ordered the Commission to judge such matters in the first instance, the Court noted that if the case were remanded to the Commission, a number of results might occur—including the Commission's administrative refusal to approve Industries' and Fund's joint transaction to vote their stock. It rationalized that if the Commission "were to deny the application—perhaps, as intimated in its brief, on the ground of 'the previous vio-

lation of the Act' "—respondents might "tire of the game" and General Time might succeed in preventing the takeover. (Appendix A, p. 10a)

The Court of Appeals then proceeded, without citation of authority, to sanction the violation, by attempting to isolate takeover transactions from the prohibitions of §17(d):

> ". . . §17(d) does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company *simpliciter;* it seeks only to prevent their doing this on a basis wherein the investment company fares worse than the affiliate." (Appendix A, p. 13a)

Exercising the judgment legislatively reserved exclusively to the Commission, the Court held that the joint transaction in this case posed no threat to the Fund's interests. This determination was based upon its speculative belief that it is:

> ". . . hard to perceive how the Commission could find that voting by an affiliate and an investment company under democratic election rules would amount to participation by the investment company 'on a basis different from or less advantageous than' the affiliate." (Appendix A, pp. 9a-10a)

The Court thus contradicted its July opinion, in which it upheld the importance and efficacy of the Commission's Rule 17d-1 advance disclosure, application and prior approval procedures, and recognized the Commission's primary and exclusive role in determining the legality of joint transactions before their initiation:

> "The varieties in which participation by an investment company may be 'different from or less

> advantageous than that' of an affiliate are infinite. The Commission could well have concluded that an attempt to specify these might fail to accomplish the Congressional purpose in some instances and in others accomplish more than Congress desired, and that the only effective method of regulation was to require advance disclosure and individual decision, at least until a pattern emerged . . . Furthermore, as the Commission points out in brief, the public notice and opportunity for interested persons to come forward provided by the application procedure may lead to the development of significant facts that would not otherwise have been disclosed." (Appendix A to Petition in Docket No. 512, pp. 15a-16a)

The Court of Appeals' November opinion also contradicted its prior July holding that a failure seasonably to seek the requisite Commission approval, whether or not the Fund's shareholders would be disadvantaged by the joint transaction, is a violation of §17(d) and Rule 17d-1. (Appendix A to Petition in Docket No. 512, pp. 15a-17a)

In the final analysis, the Court of Appeals disposed of the substantial questions raised before it by concluding that General Time "lacks standing" to raise them. (Appendix A, p. 11a)

The Court reasoned with respect to General Time's standing that (a) a portfolio company of a mutual fund is not protected against violations of the Act; thus, (b) it lacks standing to maintain its own suit to enjoin such violations; and, therefore, (c) it lacks standing to appeal an adverse judgment, binding on it as a party, that will enable the joint transaction to be consummated.

By its decision, the Court of Appeals also denied General Time standing to be heard at an evidentiary hear-

ing on the scope of appropriate relief, although it was a party-defendant and had participated in all prior phases of this case (administrative hearing before the Commission, proceedings in the District Court and appeals to the Court of Appeals).*

The Court of Appeals thus interposed an insurmountable barrier between the parties engaged in unlawful acts and the party against whom those acts were directed. In so depriving General Time of its right to be heard, the Court has contravened principles enunciated by this Court, and has denied General Time due process of law.

Reasons for Granting the Writ

I. The Decision of the Court of Appeals Raises Federal Questions of Great Importance to the Investing Public and to the Effective Implementation and Enforcement of the Securities Laws.

When it passed the Investment Company Act of 1940, Congress was concerned with abuses in the mutual fund industry and with matters of national public interest and

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* The Commission stated to the District Court that General Time's request for an evidentiary hearing should be granted since the evidence General Time proposed to introduce would be of relevance and importance in determining the scope of any final decree fashioned by the Court. (Transcript of Hearing, September 16-17, 1968, p. 15) Thus, the Court of Appeals' conclusion that "none of the parties" except General Time "desired to submit any evidence" is not entirely accurate. (Appendix A, p. 5a) However, even if true, it does not justify the refusal to hold such a hearing which deprived General Time of its right to be heard.

significance to the investing public.* Reflecting that concern, Congress committed to the Commission the jurisdiction and power to fashion comprehensive regulations to govern the acts and practices of mutual funds and their affiliates.

Pursuant to the §17(d) mandate to "prescribe rules and regulations", the Commission adopted Rule 17d-1 which prohibits participation by mutual funds and affiliated persons in joint transactions "unless an application . . . has been filed with the Commission and has been granted by an order . . ." approving the transaction.** This Court has recognized that

> "Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own. . . ." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 767 (1947).

The Commission advocated this approach in the Courts below:

> "Thus, the question of whether or not the takeover should be consummated will be determined, in the first instance, by the Commission in the exercise of its authority and responsibility under the Act,

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* See "Findings and Declaration of Policy" of the Act, 15 U. S. C. §80a-1, Appendix D, pp. 25a-28a.

** The proscriptions of §17(d) and Rule 17d-1, that mutual funds may not participate in joint transactions on a less advantageous or different basis than their affiliates, and that such participation be on a basis consistent with the policies and purposes of the Act, are to be applied initially by the Commission upon its review of timely applications required by that Section and Rule.

> subject to judicial review." (Memorandum of the Securities and Exchange Commission In Support of Its Proposed Final Judgment of Permanent Injunction, p. 6)

In its July opinion, the Court of Appeals recognized that the "only effective method of regulation [under §17(d)] was to require advance disclosure" to the Commission for its approval or disapproval of the proposed joint transaction. (Appendix A to Petition in Docket No. 512, p. 16a) The Court noted in that opinion that the Commission is the "agency responsible for the execution of Congressional policy and vested with expertise" regarding matters involving joint transactions under the Act, and quoted with approval principles set forth by this Court in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 800 (1945):

> "'An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based on evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration'."* (Appendix A to Petition in Docket No. 512, p. 14a)

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* In view of these principles, the Court below should have preserved the *status quo*. As this Court said in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433 (1940):

(*Footnote continued on following page*)

But all these principles were discarded by the Court of Appeals in both its July and November opinions, when it judicially approved on its own the joint transaction of Industries and Fund to vote their unlawfully acquired stock, and when it speculated as to the results of the administrative proceeding requested by the Commission, and then concluded by way of prejudgment that such a proceeding would be disadvantageous to respondents.

Thus the decision of the Court of Appeals will stultify the Commission's disclosure, application and approval requirements under the Act, will not deter similar abuses in the future, and will "adversely affect" the "national public interest and the interest of investors".* See "Findings and Declaration of Policy" of the Act, 15 U.S.C. §80a-1 (Appendix D, p. 26a).

(*Footnote continued from preceding page*)

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."

See also, *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951); *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948), petition for *cert. dismissed*, 366 U. S. 908 (1949); *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 191 F. 2d 658 (D. C. Cir. 1951), *cert. denied*, 343 U. S. 955 (1952).

* The importance of the questions raised in the instant case, including the Act's protection of portfolio companies against overreaching by mutual funds and their affiliates in contravention of the express purposes and policies of the Act, has again recently been underscored in a suit brought by a portfolio company claiming violations of §17 by a mutual fund and its affiliates. *National Sugar Refining Co.* v. *Burnham & Company, et al.*, 68 Civil 4590 (S. D. N. Y. 1968).

The "Findings and Declaration of Policy" specify that mutual funds "are affected with a national public interest" which is "adversely affected" whenever they engage in conduct contravening the prohibitions of the Act and the Rules enacted by the Commission pursuant to specific delegations thereunder.*

In summary, the Court below ignored the existence in this case of all the factors necessitating deference to an agency's jurisdiction.** First, Congress has expressly delegated to the Commission the role of approving joint transactions before they can be implemented. Section 17(d) of the Act. Second, in cases such as this, involving complex, technical questions concerning mutual fund-affiliate relations, the need is apparent for initial expert review by the agency having continuous and specialized knowledge and experience. See, *e.g.*, *Far East Conference* v. *United States*, 342 U. S. 570, 574-575 (1952). Third, uniformity and consistency of the regu-

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* Indeed, the statement by the Court of Appeals that §17(d) "does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company . . ." (Appendix A, p. 13a) directly contravenes the Findings of the Act "that investment companies are affected with a national public interest in that, among other things . . . such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce . . ." (Appendix D, p. 25a)

** In its July opinion the Court below held that the substantial evidence doctrine, as applied in *SEC* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 113-27 (1949), required confirmation of the Commission's finding that Industries and Fund violated the Act. But in both its July and November decisions the Court contradicted that doctrine by making its own findings (in contravention of §43(a) of the Act), *e.g.*, that the violation was "innocent", and by refusing to give substantial weight to the Commission's request for aid in preserving and protecting its primary jurisdiction under the Act.

latory scheme under the Act can only be promoted by deference to the Commission. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 220-21 (1966). Finally, the integrity of the regulatory scheme and the efficient administration of justice require courts to permit the Commission to exercise its primary administrative functions.* See, *e.g.*, *Maddock & Miller, Inc.* v. *United States Lines*, 365 F. 2d 98, 101 (2d Cir. 1966).

II. The Decision of the Court of Appeals Is in Conflict With the Principles Established by this Court for Determining the Standing of a Party to be Heard.

In its November opinion, the Court below held that General Time did not have standing to sue, standing to appeal, or even standing to elicit proof, in connection with a violation of the Act involving a takeover of General Time. That holding was based on the Court's view that the party seeking to be heard, General Time, was not within the group covered by the terms of the statute, and its prejudgment as to the ultimate availability of the relief sought. General Time submits that the standard adopted below is in conflict with pronouncements of this Court which clearly establish the right to be heard on the part of aggrieved parties not specifically covered by a statute.

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* In *Fontaine* v. *SEC*, 259 F. Supp. 880, 887 (D. P. R. 1966), it was held that "the doctrine of primary jurisdiction" is applicable to administrative proceedings involving §17 of the Act. Moreover, courts have traditionally acceded to the primary jurisdiction of an agency when such jurisdiction has been asserted by a private party or the agency, or both. *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U. S. 658 (1963); *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548 (1959); *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134 (1946); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F. 2d 63 (9th Cir. 1949).

This Court has made it clear that standing is broader than "coverage", and that the "gist of the question of standing" is whether the party seeking to be heard has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends" for illumination of difficult questions. *Baker* v. *Carr,* 369 U. S. 186, 204 (1962).

This Court has rejected a relief-oriented coverage theory by making clear that standing is *not* dependent upon a predetermination of the likelihood that a party will ultimately be granted relief:

> "It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." *Baker* v. *Carr, supra* at 208.

Very recently, in *Flast* v. *Cohen,* 392 U. S. 83 (1968), this Court further indicated the breadth of the prerequisites for standing:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." (*Id.* at 99)
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>
> "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." (*Id.* at 99-100)
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> * * *
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> "So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits . . . or those which are feigned or collusive in nature . . . ." (*Id.* at 100)

Flast v. *Cohen, supra,* also makes clear that standing exists when there is "a logical nexus between the status asserted and the claim sought to be adjudicated." (*Id.* at 102)

Finally, it is difficult to imagine a better case than this in which, as *Flast* points out, the Court may "feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor." (*Id.* at 106)

The Court below nevertheless held that General Time was not a party intended to be covered by the Act,* and then denied General Time standing by relying upon that construction of §17(d):

> ". . . Congress necessarily assumed that the court's jurisdiction would be invoked by someone showing an injury of the sort the Act meant to prevent, and GTC [General Time] has not done this." (Appendix A, p. 11a)

The Court nonetheless recognized General Time's "logical nexus" to the violation of the Act that was the subject matter of the controversy being "adjudicated", but still denied it standing to challenge that violation:

> "To allow a company whose shares were being acquired by an affiliate and an investment company without the prior approval required by §17(d) and Rule 17d-1 . . . to enforce the Investment Company

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* General Time's Petition now pending in Docket No. 512 challenges the Court of Appeals' construction of the Act which excluded portfolio companies of mutual funds and the general investing public from the coverage of the protective provisions of the Act.

> Act . . . would stretch [the standing doctrine] well beyond the bounds limned by [Congress]." (Appendix A, pp. 12a-13a)

In relying exclusively on "coverage", the Court below has adopted an approach directly in conflict with the principles of *Baker* v. *Carr* and *Flast* v. *Cohen, supra.** General Time's standing is clear since it has a "stake" in the outcome of the controversy, has sharpened "the presentation of issues . . . for illumination of difficult" questions (369 U.S. at 204), and has "a logical nexus" to the "claim sought to be adjudicated" (392 U.S. at 102).**

The standard adopted by the Court below will have a direct impact on the fundamental rights of aggrieved parties to be heard. Henceforth, at least in the Second Circuit, in order to have standing parties must be able to demonstrate specific coverage by the statutes in question. The instant case is illustrative of the consequences of the Court's standard. Here, General Time's standing was denied despite its multiple "status" (as a portfolio company of Fund, and a statutory affiliate of both Fund and Industries) with respect to the very "claim sought to

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* The Second Circuit has also created coordinate conflict with the Fifth Circuit which has correctly stated the test for standing:

> "Stated broadly, standing to litigate a 'case or controversy' depends on whether the plaintiff's interest, economic or civil, or the public's interest is sufficiently important to justify judicial determination of the controversy." *Puente de Reynosa S. A.* v. *City of McAllen*, 357 F. 2d 43, 46 (5th Cir. 1966).

** Indicative of General Time's personal stake in this controversy is its right to participate in §17 administrative proceedings. Its right has been recognized by the Commission (Memorandum of the Commission in Support of Its Proposed Final Judgment of Permanent Injunction, p. 6), and General Time ought to have standing to raise the issue of primary jurisdiction in order to protect that right.

be adjudicated" (the continuing violations of the Act involving an unlawful takeover of General Time by Fund and Industries).

The conflict with this Court's principles was further graphically demonstrated when the Court of Appeals reasoned that "coverage" is not only the test for standing to sue, but also for standing to appeal:

> "[General Time's] lack of standing to complain of a violation of §17(d) is as fatal on appeal as if it had brought an independent suit." (Appendix A, p. 14a)

Irrespective of General Time's standing to *sue*, it was joined as a defendant and is bound by the final judgment and clearly has standing to *appeal* as a party aggrieved by a lower court judgment.*

The approach of the Court below with respect to standing to appeal directly conflicts with *Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77 (1958), where this Court held that a mere intervener has "standing to secure review of the judgment below by appeal", because

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* General Time brought its own suit to enjoin respondents' §17(d) violations. On October 23, 1968, the Court of Appeals affirmed the District Court's dismissal of that action. *General Time Corporation* v. *Talley Industries, Inc.*, — F. 2d — (2d Cir. 1968), unofficially reported in CCH Fed. Sec. L. Rep. ¶92,291, p. 97,393. (General Time has not petitioned this Court for certiorari in that case because substantially the same issues are raised by the instant Petition and the Petition in Docket No. 512.) In its opinion in that case, the Court of Appeals recognized that its July decision, upon which the District Court's final judgment was based, "*is binding on GTC* [General Time] *as a party; indeed, in that capacity, GTC is now seeking Supreme Court review* [in Docket No. 512]." *Ibid;* emphasis supplied.

> "It is enough, for purposes of standing, that we have an actual controversy before us in which [appellant] has a direct and substantial personal interest in the outcome." (*Id.* at 83)

A party's standing to appeal requires only the necessary "interest" in an "actual controversy", and does not depend upon a court's view as to the specific coverage of a statute or what should be the outcome of the controversy. See *Hanson* v. *Denckla,* 357 U. S. 235, 245 (1958); *Glenn* v. *American Surety Co.,* 160 F. 2d 977, 981 (6th Cir. 1947); *West* v. *Radio-Keith-Orpheum Corp.,* 70 F. 2d 621, 624 (2d Cir. 1934); *John T. Porter Co.* v. *Java Cocoanut Oil Co.,* 4 F. 2d 476, 478 (9th Cir.), *cert. denied* 268 U. S. 607 (1925).

Moreover, the consequences of the decision of the Court of Appeals will deprive party-defendants of crucial rights to participate in a meaningful way in proceedings that can result in final determinations adverse to them. In this case, the Court below affirmed the denial by the District Court of General Time's right to elicit evidence in the District Court. That denial conflicts with the Sixth Circuit which held in *Cohen* v. *Young,* 127 F. 2d 721, 724 (6th Cir. 1942), that "[s]ince appellant is a party" it follows that it "had a right to be heard not only in argument, but in the presentation of evidence." See also, *SEC* v. *Frank,* 388 F. 2d 486 (2d Cir. 1968).

The Court of Appeals' decision not only conflicts with the specific directives of this Court for determining standing, but also contravenes the philosophy underlying the securities laws as expressed by this Court.

The securities laws were enacted by Congress in part as prophylactic legislation to prevent abuses arising from transactions in the securities of publicly-held companies. Private enforcement is "a necessary supplement to commission action" and can be, as with proxy rules, *J. I.*

Case v. *Borak,* 377 U. S. 426 (1964), "a most effective weapon" in the enforcement of the Act consonant with its broad Declaration of Policy "that investment companies are affected with a national public interest." Appendix D, p. 25a. That "enforcement here" is sought "by a private party rather than the agency should not be controlling." *Studebaker Corp.* v. *Gittlin,* 360 F. 2d 692 698 (2d Cir. 1966). This Court's directive that "securities legislation" be construed "flexibly to effectuate its remedial purposes", *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 195 (1963) can be effectively implemented in an action brought by the issuer corporation, which is in the best position to take immediate preventive action to protect the integrity of transactions in the corporation's stock. Indeed, the issuer is probably the only party with up-to-date information, and with the financial resources, to act expeditiously and bring a suit to prevent, for the benefit of the corporation and its stockholders, the continuing unlawful transactions in its stock before substantial, and perhaps irreparable, damage occurs.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 197—September Term, 1968.

(Argued November 1, 1968 Decided November 19, 1968.)

Docket No. 32792

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

GENERAL TIME CORPORATION,

Defendant-Appellant,

and

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Defendants-Appellees.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal by General Time Corporation from a final judgment of permanent injunction entered by the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, in an action by the SEC, in which GTC was a defendant, to enjoin an affiliate of an invest-

ment company and the investment company from violating §17(d) of the Investment Company Act by transactions involving General Time Stock. Affirmed.

PAUL G. PENNOYER, JR. (Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., Lawrence Kill and Jerold Oshinsky, of Counsel), *for Appellant.*

WALTER L. STRATTON (Donovan Leisure Newton & Irvine, New York, N. Y., Ben Vinar and Roger W. Kapp, of Counsel), *for Appellee Talley Industries, Inc.*

CLENDON H. LEE (O'Connor & Farber, New York, N. Y., Stanley L. Sabel, of Counsel), *for Appellees American Investors Fund, Inc. and Chestnutt Corporation.*

RICHARD V. BANDLER, Associate Regional Administrator (Philip A. Loomis, Jr., General Counsel, David Ferber, Solicitor, Paul Gonson, Ass't General Counsel, Washington, D. C., Edwin H. Nordlinger, Securities and Exchange Commission, New York, N. Y., of Counsel), *for Securities and Exchange Commission, amicus curiae.*

FRIENDLY, *Circuit Judge*:

This is the third and, we hope, the last chapter of litigation in this court concerning the acquisition by Talley Industries, Inc. (Industries) and American Investors Fund, Inc. (Fund) of stock in General Time Corporation (GTC). The earlier ones, Docket Nos. 32506 and 32299/32300, are chronicled in 399 F. 2d 396 (2 Cir. 1968) and —— F. 2d ——, slip opinions 1968 Term 107-19, and we shall assume familiarity with these opinions.

Appendix A

The instant appeal stems from our first decision, 399 F. 2d 396, in which we upheld the SEC's position that by acquiring shares of GTC in the winter of 1967-68 and interesting Fund in also purchasing them, Industries had, perhaps unwittingly, violated §17(d) of the Investment Company Act[1] and the Commission's Rule 17d-1 thereunder.[2] In remanding the case to the District Court for the Southern District of New York for the entry of an appropriate decree, we were at pains to make clear, however, that "our reversal of the judgment dismissing the complaint does not imply any belief on our part that the SEC is entitled to the drastic relief sought," 399 F. 2d at 405. This had included a requirement that

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[1] This provides:

> (d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 80-12(d) (3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant.

[2] This prohibits transactions within the scope of §17(d)

> . . . unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval, or prior to such adoption of modification if not so submitted, ...

Appendix A

Industries and Fund withdraw any votes previously cast at the annual meeting of GTC in April 1968, where a slate nominated by a committee formed by Industries had apparently won a contested election, and an injunction against their voting their shares for nominees for directors whose names had been or might be proposed by Industries or for any merger or consolidation of GTC with Industries. We pointed out, 399 F. 2d at 405:

> "The objective of §17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate 'on a basis different from or less advantageous than that of such other participant.' On the face of things that has not happened here up to this time, and the objective for a court of equity must be to insure that it does not happen in the future. While we do not undertake to particularize the form of a decree, a prohibition against sale of its shares by Industries without according Fund a fair opportunity to participate would be one obvious device to that end. On the other hand, as at present advised, we fail to perceive how the interest of Fund's stockholders would be advanced by such provisions as requiring Industries and Fund to withdraw votes cast at the April 22 stockholders' meeting of General Time and enjoining further voting by them. Requirements of that sort would have a strong tendency to induce forced liquidation at least on the part of Industries, which surely did not make its large investment in order to be a voteless minority stockholder in General Time, and this might well be detrimental rather than advan-

> tageous to the stockholders of Fund. Whether or not General Time had sufficient standing to direct judicial attention to the violation of §17(d), an issue on which we have no occasion to pass, protection of the interests of its management in retention in office is not an objective of that section. While an order going beyond what would otherwise be the necessities of the case may sometimes be justified as against a deliberate flouter of regulatory statutes, Industries and Fund cannot be so regarded."

Judge Wyatt proceeded promptly to carry out the task assigned to him. He ascertained that none of the parties except GTC desired to submit any evidence. The SEC had joined GTC as a defendant, although seeking no relief against it other than a temporary restraining order against its reconvening the 1968 annual meeting or giving any effect to the votes cast there until a preliminary injunction was issued. In light of what he considered GTC's limited role in the action, the judge declined to receive evidence from GTC but allowed its counsel to make an extensive offer of proof. After inviting all parties to submit proposed final decrees and supporting briefs, he distributed a proposed decree drawing on these drafts and then held a further hearing where suggestions were received and many were adopted.

The decree entered by the district court begins by providing generally that so long as Industries is an "affiliated person" of Fund as that term is defined in §2 (a)(3) of the Investment Company Act, Industries and Fund are enjoined from effecting any transaction in which Industries acts as principal and Fund is a joint or a joint and several participant with Industries without first having obtained Commission approval. It then

says that certain acts are not be be regarded as "transactions" thus enjoined, provided there is no consultation or communication between Industries and Fund concerning them. These include the voting of any GTC shares owned by either; the nomination by Industries of directors for election to the board of GTC and solicitation by Industries of proxies for their election or with respect to any merger, consolidation or sale of assets; the disposition by Fund of any GTC shares owned by it; and the merger or consolidation of GTC and Industries or the sale of either's assets to the other. The last provision was importantly qualified by a statement that "nothing contained in this judgment affects whatever applications may be required under Section 17(b) of the Act."[3] The decree then proceeds with elaborate provisions designed to insure Fund equal or preferential treatment with respect to any sale of the GTC shares. Industries may not sell GTC shares on the New York Stock Exchange without giving Fund advance notice of three full business days; if Fund desires to sell, Industries must desist from selling for ten business days unless Fund shall sooner have completed its sales or abandoned its selling program. So long as Fund holds any GTC shares, Industries may not sell any of its own otherwise than on the NYSE save (1) as incident to a merger or similar transaction on terms

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[3] So long as Industries is an affiliate of Fund and of GTC, any transaction whereby Industries or GTC acquired the GTC shares owned by Fund would be prohibited by §17(a)(2) and, if the transaction involved issuance of the purchaser's securities, also by §17(a)(1), unless the SEC granted an exemption under §17(b); this can be done only if the Commission finds, *inter alia*, that "the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned."

equally available to all GTC shareholders; (2) pursuant to a tender offer from a third person equally available to all GTC shareholders, with Fund to have a preference over Industries if the offer is for a limited number of shares; (3) in any other way that enables Fund to dispose of an equal percentage of its stock "on exactly the same terms and conditions as the disposition by Industries"; or (4) in any other manner approved by the Commission and thereafter by the district court. GTC is directed to reconvene its annual meeting, which had been recessed since April 22, 1968, and to include the votes cast by Industries and Fund in the count. The decree concludes with the usual provision retaining jurisdiction.

The SEC has not appealed from the decree, which broadly sustained its position. GTC has. Its complaint is that the district court did not enter the decree the SEC had proposed. This provided that "unless and until an application pursuant to Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1 first has been filed with and has been granted by an order of" the Commission, Industries and Fund not only were enjoined from further acquisitions of stock of GTC but were required to withdraw any votes cast at the 1968 annual meeting, were enjoined from voting shares for nominees proposed by Talley or for merger or other combination of GTC with Talley, and were forbidden to transfer or dispose of any of their GTC shares.[4] In declining to enter the decree proposed by the SEC, the judge stated that while he "would feel obliged"

[4] Our summaries both of the court's judgment and of the SEC's proposed judgment are abbreviated and omit numerous provisions not central to the dispute.

to follow the lead given by this court's opinion "to the extent that I am permitted to make an independent finding and determination, I have made that finding and determination that no such injunctive relief is appropriate."[5] At our invitation the SEC has submitted a brief as *amicus curiae* explaining why it believes its proposed judgment should have been entered.

We stress at the outset that the issue is not whether we would upset or approve the upsetting of an order of the SEC containing the provisions of the decree proposed by it to the district court. Cases such as *SEC* v. *New England Electric System,* 390 U. S. 207 (1968), are thus inapposite. The only order the SEC has entered here is one denying the request for a declaration of nonapplicability of §17(d) to the purchases by Industries and Fund or, in the alternative, for retroactive approval. Instead of making its own order, §§38(a), 40, 42(a), the SEC, doubtless because of exigencies of time, availed itself of the authority conferred by §42(e) to come into the district court and invoke the court's injunctive powers. When it did this, it submitted itself to judicial concepts of equity. In our first opinion we referred briefly to *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329-30 (1944), decided under a statute whose language was very similar to that of §42(e) of the Investment Company Act. The entire passage from Mr. Justice Douglas' opinion merits quotation:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An

[5] The decree the SEC submitted to Judge Wyatt differed from the prayer of its complaint in being wholly conditioned by inclusion of the "unless and until" clause quoted in the text. Contrast 399 F. 2d at 401.

> appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

It is said, however, that this case is different. The issue in *Hecht Co.* v. *Bowles* was whether past violations required an injunction against future ones that might or might not occur, and the case raised no problem of the relation between court and agency. Here, it is argued, the district court has refused to enjoin a violation that is right under its eyes, namely, the voting of the GTC stock acquired by Industries and Fund. Such voting, it is contended, does not cease to be a part of a "transaction" in which Fund is "a joint or a joint and several participant" with Industries simply because there is no further consultation or communication between them. The argument continues that if a proper application had been made under Rule 17d-1, the SEC might have approved the acquisition of the shares but have required a further application before allowing them to be voted—although it is hard to understand why any business man would buy stock under such a threat of administrative sterilization and equally hard to perceive how the Commission could find that voting by an affiliate and an investment company under demo-

cratic election rules would amount to participation by the investment company "on a basis different from or less advantageous than" the affiliate. Again, while the conditions developed by the district court with respect to sale—some of them suggested by the SEC—appear admirably designed to achieve the statutory objective, it is contended that the devising of such conditions was the job of the SEC and not of the district judge.

Mere statement makes it plain that the arguments are more concerned with the adjective question—by no means an unimportant one—of the proper relation of court and agency in the enforcement of the Investment Company Act than with the substantive objective of protecting the security holders of Fund, to which §17(d) is addressed. The practical point—and this, of course, is what the fighting is all about—is that, as we read the decree submitted by the SEC, Industries and Fund would have been obliged forthwith to withdraw the votes cast by them at GTC's 1968 annual meeting. This would have assured continuation of the incumbents' control until the spring of 1969, and if the Commission were to deny the application—perhaps, as intimated in its brief, on the ground of "the previous violation of the Act"—or if there were to be the delays not uncommon in the process of administrative decision and judicial review, for still another year, with the not unlikely prospect that Industries would tire of the game. We think it questionable whether such a result in this case of innocent violation of §17(d) would be consistent with "the qualities of mercy and practicality" that "have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs," of which the Supreme Court spoke. We are not required, however, to determine whether or not we would sustain these arguments, or some of them, if they were made on

an appeal by the SEC. The agency has not appealed,[6] and we conclude that GTC lacks standing to make them.

We fully recognize the principle, affirmed in *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432 (1964), that private enforcement "provides a necessary supplement to Commission action," to effect compliance with securities legislation. Indeed, we were the first court of appeals to uphold private actions to enforce duties created by the Investment Company Act. *Brown* v. *Bullock,* 294 F. 2d 415 (2 Cir. 1961); cf. *Schwartz* v. *Eaton,* 264 F. 2d 195, 198 (2 Cir. 1959). But this does not mean that any person may sue. When §44 of the Investment Company Act vested the district court with "jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder," Congress necessarily assumed that the court's jurisdiction would be invoked by someone showing an injury of the sort the Act meant to prevent, and GTC has not done this.

A case directly in point is *Greater Iowa Corp.* v. *McLendon,* 378 F. 2d 783, 792-94 (8 Cir. 1967), where the court

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[6] It states in its *amicus* brief that its decision not to appeal rested on its approval of much of the decree "as a substantive matter," on "its concurrence in this Court's construction of the phrase 'joint or a joint and several participant,' " and on "pressing priorities weighed against the Commission's limited manpower." At argument its counsel indicated that its chief concern in filing an *amicus* brief was to avoid the establishment of an unfortunate precedent. Our decision is limited to the special circumstances of this case—an excusable violation of §17(d) based on what we considered to be an overly literal although not unnatural reading of its words.

held that a corporation lacked standing to complain of acquisition of its stock by what was assumed to be an unregistered investment company. Like Judge Gibson there, "we see no basis under this [the Investment Company] Act that the issuer company can oversee the trading of its securities or object to the method in which it shares are acquired or the persons who acquire them." In *General Time Corp.* v. *American Investors Fund, Inc.*, 283 F. Supp. 400 (S. D. N. Y. 1968), Judge Bryan concluded that GTC lacked standing to complain of the transaction here at issue since Congress intended the protection of the Investment Company Act "to be for the benefit of persons having an interest in those companies" and not of corporations whose securities were being acquired. While on the appeal from that judgment we did not decide that question, —— F. 2d ——, ——, we believe the district court's view was sound—indeed, we now think our decision would better have been placed upon that ground, see fn. 7. Even if this court should ultimately uphold the standing of a corporation to seek an injunction against dealings in its securities violating provisions of the securities laws designed to protect its own security holders, a question we left open in Docket No. 32300, slip opinions p. 117, this would not mean that an issuer has standing to espouse the cause of stockholders of a stockholder endangered by the violation of a statute framed to meet their special needs.

To allow a company whose shares were being acquired by an affiliate and an investment company without the prior approval required by §17(d) and Rule 17d-1 to act as a "private attorney general" to enforce the Investment Company Act, see *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (2 Cir.), vacated as moot, 320 U. S. 707 (1943), would stretch that doctrine well beyond the bounds limned

by its author. Apart from the fact that there, as in *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940), and *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942), the courts were construing the phrase "person aggrieved" in statutes allowing review of administrative action, see 134 F. 2d at 701-12, Judge Frank proceeded on the basis that the petitioner, a buyer of coal whose price the Bituminous Coal Commission had fixed, was "threatened with financial loss by a Commission's order, which fixed prices and prevents competition among those from whom the consumer purchases," 134 F. 2d at 705, and thus was within the very class the statute aimed to protect. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613-17 (1968). The only argument made to show how GTC may suffer financial loss from the acquisition of its stock by Industries and Fund in an unapproved joint transaction forbidden by Rule 17d-1, was that GTC might obtain a higher price in a merger or other combination if the prospective partner were not already in control. Apart from the facts that GTC here declined to discuss a merger with Industries before the 1968 annual meeting and then negotiated one with another company on unattractive terms, see 399 F. 2d at 400-01, §17d does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company *simpliciter;* it seeks only to prevent their doing this on a basis wherein the investment company fares worse than the affiliate. In short, even if we were to assume a possibility of loss to GTC from the transaction accomplished by Industries and Fund, this would not constitute the injury to holders of investment company securities that §17(d) sought to prevent. GTC has not been vested with the role of guardian either of the shareholders of Fund or of the integrity of the administrative process.

We do not believe matters should stand any differently because in this case GTC was named as defendant in the SEC's action. The only relief the SEC sought against it was a temporary restraining order against reconvening the annual meeting pending the issuance of an injunction, and this has now been denied. While the decree does direct GTC to proceed with the long-delayed meeting, that is only what the law would require in any event once the SEC's prayer for an injunction against this was denied. While the SEC could appeal from the denial of the relief sought against GTC, the latter cannot. When we look behind form to substance, GTC is endeavoring on this appeal to vault from its position as a nominal defendant to that of a plaintiff and to take over a role which the true plaintiff, the SEC, has abandoned. Its lack of standing to complain of a violation of §17(d) is as fatal on appeal as if it had brought an independent suit.[7]

Since GTC has indicated that in the event of an adverse decision it will endeavor to carry the matter further, we think it best to decide the question of continuing the injunction *pendente lite* against the reconvening of the 1968 annual meeting that, in one way or another, now has been in effect for more than half the term for which the directors were elected. Counsel for Industries suggested at the argument that if we were unwilling to dissolve the injunction at that time, we should lift it to the extent of allowing the inspectors of election to report and any other normal business to be completed, with the proviso that if the persons declared to be elected as directors were

[7] To the extent that our opinion in Docket No. 32300, —— F. 2d at ——, slip opinions, 1968 Term, 116-17,may imply that GTC has standing to seek review of the scope of relief granted the SEC, we withdraw this.

other than the incumbents, the new directors would be enjoined from assuming office until our decision on this appeal. This, it was said, would have the advantage of enabling the parties to determine promptly whether they wished to indulge in a further round of litigation concerning the validity of proxies under state law rather than deferring such a decision until the Supreme Court acts on GTC's petitions for certiorari to review our decisions in Nos. 32506 and 32999[8] and the petition GTC announced its intention to file from our decision here if this should be against it. While we deferred acting on Industries' request pending decision, we think it proper that the injunction against reconvening the annual meeting be partially lifted, on the terms proposed by Industries, on a date ten days after the filing of this opinion. If within twenty days after the filing of this opinion GTC files a petition for certiorari to review this judgment, the injunction against the assuming of office by any directors other than the incumbents shall continue until final determination by the Supreme Court in all these cases where GTC has sought certiorari; if it should not, the injunction will be fully lifted. In view of this disposition, GTC's application for a stay pending final determination by the Supreme Court on the petition for certiorari in Docket No. 32299 is denied. The parties may submit proposed orders if they desire.

Judgment affirmed.

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[8] GTC informed us that it did not intend to seek certiorari from our affirmance of Judge Bryan's decision in No. 32300.

APPENDIX B

United States District Court for the Southern District of New York

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION, DEFENDANTS.

Filed October 4, 1968

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter having come on for trial before this Court without a jury, [recitation of appearances of counsel for parties], and this Court having issued a final judgment and order dismissing the complaint as to all defendants; and the Court of Appeals for the Second Circuit having on July 31, 1968 issued its opinion reversing the said judgment and directing this Court to proceed promptly to formulate an injunction consistent with its opinion, and the mandate of the said Court of Appeals having been transmitted to this Court on September 13, 1968; and this Court having been advised by the Commission, by Industries, and by Fund and Chestnutt Corporation that they did not wish to present any further evidence on the subject of the relief to be granted by injunction and this Court having been advised by General

Time that it wished to present further evidence on that subject but this Court declining to receive such evidence from General Time as a nominal party defendant; and proposed forms of final judgment (with supporting memoranda) having been submitted by the Commission, by Industries, and by Fund and Chestnutt Corporation, respectively, and General Time having submitted a statement (with supporting memorandum) requesting entry of final judgment in the form proposed by the Commission; and after hearing counsel for the parties on this date,

Now, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I.

A. So long as, or whenever, defendant Industries is an "affiliated person" of defendant Fund as that term is defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. §80a-2(a)(3); the "Act"), defendants Industries and Fund are permanently enjoined from hereafter effecting any transaction in which Industries acts as principal and in which the Fund is a joint or a joint and several participant with Industries without first having obtained from the Commission approval under Section 17(d) of the Act and under Rule 17d-1 promulgated thereunder (17 CFR 270.17d-1).

B. None of the following acts is a "transaction" enjoined by paragraph A provided there is no consultation between Industries and Fund concerning the act and no communciation between them concerning the act (other than that required by law or by this judgment):

1. The voting on any matter by Industries or Fund at any meeting of shareholders of General

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Time of any shares of common stock of General Time ("General Time shares") now owned by either of them.

2. The nomination by or on behalf of Industries of directors for election to the Board of Directors of General Time and the solicitation by Industries, alone or in conjunction with others (not including, however, Fund) of proxies for the election of such nominees or the solicitation of proxies in respect of any merger, consolidation or sale of assets involving General Time.

3. The disposition by Fund at any time, or from time to time, of General Time shares now owned by it.

4. A merger or consolidation of General Time and Industries or any subsidiary of Industries or a sale of the assets of General Time to Industries or any subsidiary of Industries, or a sale of the assets of Industries to General Time or any subsidiary of General Time.

Nothing contained in this judgment affects whatever applications may be required under Section 17(b) of the Act.

II.

So long as Industries is an "affiliated person" of Fund as that term is defined in Section 2(a)(3) of the Act, defendant Industries is permanently enjoined from entering into or inducing Fund, through its investment adviser or otherwise, to enter into any transaction in which Fund is a joint or a joint and several participant with Industries.

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III.

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it, defendant Industries is permanently enjoined from selling any shares of capital stock of General Time now owned by it on the New York Stock Exchange (the "Exchange") except in accordance with the following procedure: if Industries proposes to make sales of General Time stock on the Exchange, it shall notify Fund by telephone or by telegraph of the number of shares proposed to be sold; within three full business days after the giving of such notice, Fund shall notify Industries that it (Fund) does or does not propose to sell on the Exchange shares of General Time stock owned by it (Fund) within the following ten business days; if Fund notifies Industries that it (Fund) does not propose to sell any shares of General Time stock on the Exchange in that period, then Industries may sell on the Exchange its General Time shares to that number of shares stated in the notice given; if Fund notifies Industries that it (Fund) proposes to sell General Time shares on the Exchange within the following ten business days, then Industries may not sell its General Time shares on the Exchange for a period of ten business days after receipt of the notice from Fund, unless in the meantime, Fund has completed its proposed sales, as to which it shall notify Industries, or Fund shall have notified Industries that Fund had abandoned its proposal to sell General Time shares within the period. Industries shall not in any event sell on the Exchange more than 10,000 General Time shares in any five business day period nor more than 25,000 such shares in any calendar month.

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IV.

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it, defendant Industries is permanently enjoined from hereafter disposing of General Time shares now owned by it (Industries) except by sales on the Exchange as provided in III above and except as follows:

A. in exchange for securities of another corporation (or cash, or a combination of cash and securities) in connection with the merger, consolidation, sale of assets or liquidation of General Time, so long as such disposition by Industries is on terms and conditions available to Fund and to all other shareholders of General Time pro rata;

B. pursuant to a tender offer from any person (not an affiliated person, or an affiliated person of an affiliated person, of Industries or of the Fund), *provided* that such offer is made to Fund and to all other shareholders of General Time, and *provided further* that if any such offer is limited to a specified number of General Time shares and if the Fund shall advise Industries in writing, not later than 10 days prior to the expiration date of such offer (or not later than the expiration of one half the period of such offer if the term thereof is less than 10 days), that it desires to accept such tender offer, Industries shall take appropriate steps to give the Fund the opportunity to dispose of all of the General Time shares which Fund desires to dispose of in response to such offer, before Industries shall dispose of any of its General Time shares in response to such offer;

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C. with respect to a proposed disposition by Industries of General Times shares in any other manner than one described above, Industries shall give written notice to Fund of such proposed disposition. Such notice shall include: (a) a description of each proposed transaction with the name of each proposed purchaser from Industries, the number of shares proposed to be disposed of, the consideration to be received by Industries, the method of payment and the proposed closing date; and (b) a statement that arrangements have been made for Fund to be offered an opportunity to dispose of such number of General Time shares owned by it as is equal to the percentage of Industries' then holdings of such stock proposed to be so disposed of by Industries, such arrangements to provide for such disposition by Fund on exactly the same terms and conditions as the disposition by Industries. At the expiration of five business days after any such notice is given to Fund, Industries may proceed to dispose of the number of General Time shares set forth in the notice by it to Fund, and in the manner set forth in such notice, provided that, if within such five day period Fund elects to accept the opportunity to dispose of General Time shares on the terms specified in such notice and has so advised Industries, its (Fund's) General Time shares have been disposed of as provided in such notice; and

D. in any other manner approved by the Commission and thereafter approved by this Court.

V.

Defendant Fund is enjoined promptly to notify Industries and the Commission (a) when, as and if Fund ceases to be a holder of five percent (5%) or more of

Industries' outstanding voting securities and (b) when, as and if Fund ceases to be a holder of all General Time shares now owned by it.

VI.

Defendant General Time is enjoined to reconvene the Annual Meeting of Shareholders of General Time, recessed from time to time since April 22, 1968, at 2 P.M. on Thursday, October 10, 1968, and to include the votes heretofore cast by Industries and Fund at the Annual Meeting of Shareholders of General Time held on April 22, 1968 in the count of votes cast at the meeting, and to require the inspectors of the election of directors of General Time to report on the results of the voting at the aforementioned Annual Meeting and to complete the business at said Annual Meeting in accordance with the By-laws of General Time and in accordance with its normal practice.

VII.

This action is dismissed as to defendant Chestnutt Corporation.

VIII.

Jurisdiction is retained by this Court for the purpose of enabling any party to apply at any time to this Court for such further order and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any provisions hereof, for the enforcement of compliance herewith or for the punishment of violations hereof.

Dated: New York, New York
October 4, 1968

INZER B. WYATT,
United States District Judge.

Judgment entered: 10-4-68

/s/ JOHN J. OLEAR, JR.
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Defendants-Appellees,

GENERAL TIME CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

It is further ordered, adjudged and decreed that, if, within twenty days, the appellant files a petition for a writ of certiorari to the Supreme Court of the United States, the injunction against the assuming of office by any directors other than the incumbents shall continue until final determination by the Supreme Court in all cases where the appellant has sought certiorari.

It is further ordered, adjudged and decreed that if petitions for writs of certiorari are not so filed, the injunction will be fully lifted.

A. Daniel Fusaro,
Clerk.

APPENDIX D

INVESTMENT COMPANY ACT OF 1940

(15 U.S.C. §80a-1 *et seq.*)

SEC. 1 FINDINGS AND DECLARATION OF POLICY

(a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is found that investment companies are affected with a national public interest in that, among other things—

(1) the securities issued by such companies, which constitute a substantial part of all securities publicly offered, are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce, and in the case of the numerous companies which issue redeemable securities this process of distribution and redemption is continuous;

(2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges, and constitute a substantial part of all transactions effected in the securities markets of the Nation;

(3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce;

(4) such companies are media for the investment in the national economy of a substantial part of the national savings and may have a vital effect upon the flow of such savings into the capital markets; and

(5) the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors.

(b) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is declared that the national public interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other invest-

ment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is declared that the policy and purposes of this subchapter, in accordance with which the provisions of this

subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors. Aug. 22, 1940, c. 686, Title I, §1, 54 Stat. 789.

SEC. 2(a)(3) DEFINITIONS

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

SEC. 17(d) TRANSACTIONS

(d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 80a—12(d) (3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations

as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

SEC. 38. RULES, REGULATIONS, AND ORDERS; GENERAL POWERS OF COMMISSION

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth. For the purposes of its rules or regulations the Commission may classify persons, securities, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, or matters.

SEC. 42. ENFORCEMENT OF SUBCHAPTER

(e) Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper

United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 80a—7 of this title, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter. Aug. 22, 1940, c. 686, Title I, § 42, 54 Stat. 842.

SEC. 43. COURT REVIEW OF ORDERS

(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order

of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Su-

preme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

RULE 17D—1. APPLICATIONS REGARDING JOINT ENTERPRISES OR ARRANGEMENTS AND CERTAIN PROFIT-SHARING PLANS.

(*a*) No affiliated person of or principal underwriter for any registered investment company (other than a company of the character described in Section 12(d) (3) (A) and (B) of the Act) and no affiiated person of such a person or principal underwriter, acting as principal, shall participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement or profit-sharing plan in which any such registered company, or a company controlled by such registered company, is a participant, and which is entered into, adopted or modified subsequent to the effective date of this rule, unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval or prior to such adoption or modification if not so submitted, except that the provisions of this rule shall not preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(*b*) In passing upon such applications, the Commission will consider whether the participation of such registered or controlled company in such joint enterprise, joint arrangement or profit-sharing plan on the basis proposed is consistent with the provisions, policies and purposes

of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

(*c*) "Joint enterprise or other joint arrangement or profit-sharing plan" as used in this rule shall mean any written or oral plan, contract, authorization or arrangement, or any practice or understanding concerning an enterprise or undertaking whereby a registered investment company or a controlled company thereof and any affiliated person of or a principal underwriter for such registered investment company, or any affiliated person of such a person or principal underwriter, have a joint or a joint or several participation, or share in the profits of such enterprise or undertaking, but shall not include an investment advisory contract subject to Section 15 of the Act.

(*d*) Notwithstanding the requirements of paragraph (*a*) above, no application need be filed pursuant to this rule with respect to any of the following:

(1) Any profit-sharing plan provided by any controlled company which is not an investment company for its officers or employees, provided no affiliated person of any investment company which is an affiliated person of such controlled company participates therein.

(2) Any plan provided by any registered investment company or any controlled company for its officers or employees if such plan has been qualified under Section 401 of the Internal Revenue Code of 1954 and all contributions paid under said plan by the employer qualify as deductible under Section 404 of said Code.

(3) Any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing, ("Investments") made by a bank and a small business investment company (SBIC) licensed under the Small Business Investment Act of 1958, whether such transactions are contemporaneous or separated in time, where the bank is an affiliated person of either (*i*) the SBIC; or (*ii*) an affiliated person of the SBIC; but reports containing pertinent details as to investments and transactions relating thereto shall be made at such time, on such forms and by such persons as the Commission may from time to time prescribe.[1]

[1] Applicable only to small businesss investment companies licensed under the Small Business Investment Act of 1958.